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In the Supreme Court of the United States

January Term 1966 7

No. 928

Elam Reamuel Temple, Petitioner

vs.

United States of America, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The Supreme Court of The United States

January Term 1967

No.....

Elam Reamuel Temple, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To: The Honorable EARL WARREN, Chief Justice of the United States Supreme Court and to the Honorable Associate Justices of the United States Supreme Court of America:

Petitioner, Elam Reamuel Temple, respectfully prays for a writ of cretiorari to the United States Circuit Court of Appeals for the Fourth Circuit, to review the final opinion and decision entered in this cause on the 17th day of November 1966 by the United States Court of Appeals for the Fourth Circuit affirming the judgment entered by the District Court dismissing appellant' appeal for failure to comply with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure.

JURISDICTIONAL STATEMENT

(A) OPINION BELOW

The first opinion of the United States Court of

Appeals for the Fourth Circuit is reported in 349 F 2d 116 (4 cir 1965) and the second opinion, dated November 17, 1966) of the United States Court of Appeals for the Fourth Circuit is setforth in the Appendix P. 13-20* The order of the District Court dated April 26, 1966 is setforth in the Appendix P. 10-B*

(B i) INVOLKING JURISDICTION

The nature of the proceeding upon which this action is brought is whether or not was there a timely notice of appeal from the judgment entered in this cause at the trial and judgment of March 31, 1966 as required by Rule 37 (a) (1) of the Federal Rules of Criminal Procedure. The jurisdiction of this Court is invoked under the Act of Congress, dated June 25, 1948, 28 U.S.C. Section 1254 (1).

(B ii)

That the opinion sought to be reviewed is dated November 17, 1966 and same was entered the same date. Notice that appellant would petition for a writ of certiorari was filed in the United States Court of Appeals for the Fourth Circuit on the 7 day of ~~November~~ December 1966.

(B iii)

The jurisdiction of this Court is invoked under the Act of Congress dated June 25, 1948, 28 U.S.C. Section 1254 (1).

(B iv)

The cases believed to sustain the petition for the allowance of the petition for writ of certiorari are setforth table of authorities (P. 6-7)

(C) (1) QUESTION PRESENTED

Did appellant file a timely notice of appeal from the judgment of the District Court entered on March 31, 1966 as required by Rule 37 (a) (1) of the Federal Rules of Criminal Procedure?

SUMMARY STATEMENT

On the 8th day of July 1963 a pre-trial hearing in the case of TART V. REVIEW COMMITTEE was held at Raleigh, North Carolina before Judge Bryan, Judge Butler and Judge Larkins, at which hearing an oral order was made requiring appellant, attorney for Tart at that time, to file a brief by August 1, 1963. The order was later reduced to writing but appellant was not furnished a copy of said order. On August 6, 1963 the United States Attorney filed a motion to dismiss under Rule 41 (2) Rules of Federal Procedure. On August 8, 1963 appellant filed a response to the motion to dismiss, stating that he had been ill together with other reasons as to why he had not filed the brief. On August 10, 1963 appellant made an oral representation to the Court that he had been prevented from filing the brief by reason of illness. The case was disposed of and on August 10, 1964 one year and two days after August 8, 1963 the District Attorney filed an application for an order to require appellant to show cause on a charge of criminal contempt of court in that the appellant allegedly made a false statement to the court, when at the trial on August 12, 1963 he claimed illness had prevented him from filing his brief. On the same day, August 11, 1964 the Court signed an order to show cause. The matter came on for a hearing September 1, 1964 and

the Court found appellant guilty and sentenced appellant to twelve months in jail (later changed to six months). The case was appealed and decided by the United States Court of Appeals for the Fourth Circuit . . . "Decided July 2, 1965 Reversed and remanded." The case came on for trial again in the District Court March 22, 1966 and judgment of the Court entered March 31, 1966, "it is adjudge that imposition of sentence be suspended and the defendant placed on probation for a period of eighteen months and that he pay a fine of $500.00." Notice of appeal was given in open court and reduced to writing and the notice became a part of the Clerk's records During the course of the March 31, 1966 trial the attorney representing appellant sustained a severe injury and suffred excessive pain during the course of the trial and upon completion of trial appellant' attorney returned home where he remained confined for several weeks. Appellant was not aware of the seriousness of the injury of his attorney. After the expiration of 10 days appellant filed a motion that he be permitted to file his formal written notice of appeal which was denied. Appellant was released under $1,000.00 bond Appendix P. 8-9 which was in effect at the time of the March 31, 1966 trial. United States Attorney filed a motion to dismiss the appeal which was sustained by the Court. Last of April 1965 Government proceeded to try to place the appellant on probation and enter an order to that effect to which the appellant did not consent. A warrant of arrest was issued by the Deputy Clerk of the Court for the Eastern District Court of North Carolina indiciting appellant for violation terms of probation and Appellant was tried again on May 5, 1966 and the Court found

appellant guilty and sentenced him to six months in jail and six months suspended upon payment $500.00 fine and probation for eighteen months, and the appellant appealed again to the Circuit Court of Appeals said Court deciding that the judgment of May 5, 1966 to be illegal. The Circuit Court of Appeals dismissed the appeal from the judgment entered on March 31, 1966 holding that appellant did not file notice of appeal timely under Rule 37 (a) of the Federal Rules of Criminal Procedure. Appellant petitions for a writ of certiorari from that portion of the Decision handed down on November 17, 1966.

REASONS RELIEF ON FOR THE ALLOWANCE OF THE WRIT

The present case is within the statutory provisions relied on to confer jurisdiction of the Court.

Appellant is relying on what actually happened at the conclusion of the trial immediately after entrance of judgment at the March 31, 1966 trial to sustain his argument that the Court errored by dismissing the appeal.

TRANSCRIP OF EVIDENCE P. 152 MARCH 31, 1966 TRIAL IS AS FOLLOWS:

"Mr. Hinsdale: (defendant's attorney) We object to the judgment of the Court and give notice of appeal to the Circuit Court of Appeals."

"THE COURT: All right sir, let his notice be."

"Mr. Hinsdale: He is under at the present time $1,000.00 bond. I suppose that would be sufficient."

"THE COURT: Yes sir, appearance bond $1,000.00 accepted."

"Mr. Hinsdale: Would the present bond."

"THE COURT" "Yes sir."

"Mr. Hinsdale: "all right."

"THE COURT: He may be released under the present bond."

Notice of appeal was given in open court and that the foregoing proceedings were taken down by the Court reporter and same became a part of the Clerk's records. That the appearance bond which was accepted was also and did become a part of the Court's records Appellant argues that the proceedings of the Court which became a part of the Court's records and the posting of the appearance bond (Appendix p. 8-9) complied with the requirements and provisions of RULE 37 (a) (1) of the Federal Rules of Criminal Procedure and that the appeal from the judgment entered March 31, 1966 should not have been dismissed.

Appellant further argues that no final judgment was entered in the case by the Court until May 5, 1966.

TRANSCRIP OF EVIDENCE PAGE 151 OF THE MARCH 31, 1966 TRIAL

"It is adjudge that the imposition of sentence be suspended and the defendant placed on probation for a period of eighteen months and that he pay a fine of $500.00."

Appellant argues that in view of the decisions of the Court that his appeal from the judgment of the Court at the March 31, 1966 trial should not have been dismissed and cites in support of his argument the following cases:

COLLIER VS. UNITED STATES 16 L ED 2nd 353

O'NEAL VS. UNITED STATES 272 F 2d 412 (5 Cir 1955)

FALLEN VS. UNITED STATES 378 U.S. 139 (1964)

CALLAND VS. UNITED STATES 323 F 2d 405 (7 Cir 1963)

DUREL VS. UNITED STATES 299 F 2d 583 (5 Cir. 1962)

UNITED STATES VS. ISABELLA 251 F 2d 583

COLLIER VS. UNITED STATES 384 US 59 (1966)

BENTON VS. UNITED STATES 259 F 2d 811 (D.C. Cir 1958)

UNITED STATES VS. CANNADY 34 F.R.D. 211 (D.C. Cir 1964)

UNITED STATES VS. TEMPLE 349 F 2d 116 (4 Cir 1965)

WHEREFORE: Petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit and that the judgment of the United States Court of Appeals for the Forth Circuit dismissing appellant's appeal from the judgment of March 31, 1966 be reviewed and reversed.

Dated at Raleigh, North Carolina

December 30 1966.

JOHN W. HINSDALE
ATTORNEY AT LAW FOR PETITIONER
LAWYERS BUILDING
RALEIGH, NORTH CAROLINA

RULE 37 TAKING APPEAL AND PETITION FOR WRIT OF CERTIORARI

(1) Notice of appeal . . . . an appeal permitted by law from a District Court to a Court of Appeals is taken by filing with the Clerk of the District Court a notice of appeal in duplicate.

(2) Time for taking appeal . . . . an appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from."

APPEARANCE BOND

We the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of ONE THOUSAND dollars ($1,000.00).

The conditions of this bond are that the defendant ELAN REAMUEL TEMPLE is to appear before United States Commissioner for the United States District for the Eastern District of North Carolina, at Raleigh, North Carolina, and in the United States District Court for the Eastern District of North Carolina at Raleigh, North Carolina, and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court for the Eastern District of North Carolina or any other United States District Court to which the defendant may be removed or the cause transferred; that the defendant is not to depart the Eastern District of North Carolina, or the jurisdiction of any other

United States District Court to which the defendant may be removed or the cause transferred after he has appeared in such other district pursuant to the terms of this bond, except in accordance with such orders or warrants as may be issued by the United States District Court for the Eastern District of North Carolina or the United States District Court for such other district; that the defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe., and to remain binding until final termination of proceedings in this case in all courts.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

ORDER ENTERED BY DISTRICT COURT

STATEMENT OF THE CASE

This cause comes before the court upon a petition by a defendant in a criminal contempt proceeding to have the court extend the time in which the defendant may file notice of appeal. This petition was filed after the time required by the Rule for filing notice of appeal had expired.

The United States resists the petition by insisting the court is without jurisdiction to extend or enlarge the time for filing a notice of appeal. It is insisted by the United States that this cause is controlled by Rule 37 and Rule 45 (b) of the Federal Rules of Criminal Procedure.

The judgment of criminal contempt, and the sentence of the court, was entered in Wilmington, North Carolina, on March 31, 1966. At that time, counsel for the defendant advised the court, in open court, of defendant's intention to appeal. No written notice of appeal as required by Rule 37 (a) has been filed, however, as of this date.

On April 15, 1966, counsel for the defendant filed the instant petition wherein he asked the court to find excusable neglect in counsel's failure to file the required notice of appeal due to physical infirmities incurred by defendant's counsel as a result of a fall which occurred during the course of the trial of the contempt proceedings. It is prayed that defendant, who is an attorney at law and member of the North Carolina Bar, be permitted to file a notice of appeal and to perfect the appeal at this late date.

CONCLUSIONS OF LAW

For purposes of this case, it can be assumed that defendant's counsel failed to file a notice of appeal due to excusable neglect. Be that as it may, it does not appear that an appeal will lie in the United States Court of Appeals for the Fourth Circuit.

It is clear that the mere oral statement, in open court, of an intention to appeal is insufficient to satisfy the requirements of Rule 37 (a). That Rule provides, in pertinent parts:

"RULE 37, TAKING APPEAL: AND PETITION FOR WRIT OF CERTIORARI.

"(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. . . ."

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment order appealed from, . . ."

Thus, defendant's statement through counsel, in open court, does not comply with the Rule. See Durel v. United States, 299 F. 2d 583 (4th Cir., 1962).

It further appears that any decision of this court cannot impose appellate jurisdiction on the Court of Appeals. Even if this court should permit defendant to file a notice of appeal after the expiration of the time prescribed in Rule 37(a) (2), this would not confer jurisdiction on the Court of Appeals. This is so even though this court should further find the cause of the late filing was excusable neglect. See the lead-

ing case of *United States v. Robinson,* 361 U.S. 220 (1960). To permit the late filing would be to enlarge the period for taking an appeal, and this is explicitly forbidden by Rule 45(b), which provides:

"Rule 45, Time.

* * *

"(b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period it the failure to act was the result of excusable neglect: but the court may not enlarge the period for taking any action under Rules 33, 34, and 35, except as otherwise provided in those rules, *or the period for taking an appeal."* (Emphasis added.)

See on this question, *Moore's Federal Practice,* Vol. 8, Paragraph 37.05/4/ (2nd Ed. 1965).

ORDER

Therefore, it is ORDERED that defendant's petition for a finding of excusable neglect and prayer for permission to appeal to the United States Court of Appeals for the Fourth Circuit be, and the same is hereby denied.

It is further ORDERED that the motion of the

United States for the dismissal of the petition be, and the same is hereby allowed.

It is further ORDERED that the Clerk serve a copy of this order upon the Honorable Robert H. Cowen, United States Attorney, Raleigh, North Carolina; Mr. John W. Hinsdale, Attorney at Law, 607-608 Lawyers Building, Raleigh, North Carolina; petitioner, Elam Reamuel Temple, Attorney at Law, Smithfield, North Carolina; Mr. William T. Woodard, Jr., Chief Probation Officer, Raleigh, North Carolina; and the Clerk, U. S. Court of Appeals for the Fourth Circuit, Richmond, Virginia.

This the 25th day of April, 1966.

OPINION OF 4th CIRCUIT COURT OF APPEALS

J. Spencer Bell, Circuit Judge:

Defendant Temple, an attorney, was tried and convicted in the district court in March 1966 on a charge of criminal contempt of court.[1] On March 31, 1966, judgment was entered suspending imposition of sentence, fining defendant 500 dollars, and placing him on probation for 18 months. Immediately following pronouncement of judgment, defendant's attorney gave oral notice of appeal in open court. The court agreed at the time that the 1,000-dollar bond then in effect would be acceptable as appeal bond.[2] On May

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[1]An earlier conviction had been reversed by this court in United States v. Temple, 349 F. 2d 116 (4 Cir. 1965).

[2]The transcript reads as follows:

"MR. HINSDALE (Defendant's attorney): We object to the judgment of the Court and give notice of appeal to the Circuit Court of Appeals.

"THE COURT: All right, sir, Let his notice be.

"MR. HINSDALE: He is under at the present time $1,000.00 bond. I suppose that would be sufficient.

"THE COURT: Yes, sir, appearance bond $1,000.00 accepted.

"MR. HINSDALE: Would the present bond—

"THE COURT: Yes, sir.

"MR. HINSDALE: All right.

"THE COURT: He may be released under his present bond."

10, 1966, written notice of appeal was filed as required by Rule 37(a) (1) of the Federal Rules of Criminal Procedure and docketed under No. 10,653. The Government filed a motion in this court to dismiss the appeal on the ground that notice of appeal was untimely, not having been filed within 10 days after entry of judgment in accordance with Rule 37 (a) (2).

It is well settled that "the filing of a notice of appeal within the 10-day period prescribed by Rule 37 (a) (2) is mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 224 (1960): Berman v. *United States*, 378 U.S. 530 (1964). See also *Dennis* v. *United States*, 177 F.2d 195(4 Cir. 1949). In the *Robinson* case, the Supreme Court held that the district court lacks power to extend the time for filing or to permit late filing of notice of appeal on the basis of excusable neglect since Rule 45 (b) expressly states that "the court may not enlarge . . . the period of taking an appeal."[3]

We recognize that under some circumstances jurisdiction may exist in the court of appeals even though notice of appeal was not actually filed with the clerk within the 10-day period specified by Rule 37(a) (2). In *Fallen* v. *United States*, 378 U.S. 139 (1964), the indigent defendant asked after sentencing if he could appeal "as an insolvent." The court replied that "the Government provides for that." Immediately thereafter, defendant had a brief conference with his court-appointed attorney, who advised defendant that he

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[3]We are pleased to note that this holding has been modifiel by the following amendment to Rule 37(a) (2). effective July 1, 1966: "Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days form the expiration of the original time prescribed by this paragraphs."

(the attorney) would not handle the appeal. Throughout the remainder of the appeal period defendant was confined in prison hospital facilities and permitted no visitors. Defendant wrote letters dated 8 days after judgment was entered against him to the clerk of the court asking for a new trial and for an appeal, which letters were received by the clerk 14 days after judgment. It was disclosed during oral argument that mail was sent out from the prison only twice weekly and that this could have caused the delay. The Court observed that "although the Government had the opportunity, it introduced no evidence—and admitted on oral argument that it had none—to dispute the record facts that petitioner had done all that could be expected to get the letter to its destination within the required 10 days." *Id.* at 144. The Court thus held that "since petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Ibid.* In *Calland* v. *United States,* 323 F.2d 405 (7 Cir. 1963), defendant alleged that fraud of his consel was the reason for no notice of appeal being filed and expressly disclaimed that he was seeking relief under Rule 45(b) on grounds of excusable neglect. The court held that *United States* v. *Robinson, supra,* was therefore not applicable and that, if defendant's allegation of fraud was found to be true in a district court hearing, the court could consider the appeal under its "inherent power to investigate whether a judgment was obtained by fraud . . . ." 323 F.2d at 408. However, neither *Fallen* nor *Calland* is applicable to the facts of the present case.

Defendant contends that his oral notice of appeal in open court, which was incorporated into the record

of the case was sufficient to satisfy the requirement of Rule 37 (a) (1), so that his notice of appeal was timely given under Rule 37 (a) (2). Oral notice of appeal given in open court has generally been held insufficient to constitute filing of notice under Rule 37 (a) (1). *Durel* v. *United States,* 299 F.2d 583 (5 Cir. 1962); *United States* v. *Isabella,* 251 F.2d 223 (2 Cir. 1958). Defendant argues, however, that oral notice of appeal should be considered sufficient under the cases of *Collier* v. *United States,* 384 U.S. 59 (1966), and *O'Neal* v. *United States,* 272 F.2d 412 (5 Cir. 1959).

Collier v. *United States, supra,* is not relevant to the facts of the present case. The Supreme Court in that case held that the defendant's filing of written notice of appeal was timely under the literal wording of Rule 37 (a) (2). The Rule (which has since been amended) provided:

> "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period and appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion."

Since the motion for a new trial was filed by the defendant within 10 days and since notice of appeal was filed within 10 days after denial of the motion, the Supreme Court held that the defendant had complied with Rule 37(a) (2), notwithstanding the fact that the defendant's motion for a new trial was untimely under Rule 33, which, required that such motion be

filed within 5 days after entry of judgment.[4] The defendant in the present case filed no motion within the 10-day period following the entry of judgment.

O'Neal v. *United States, supra,* which is cited by the defendant, is illustrative of a line of cases which, giving a liberal construction to Rule 37(a) (1), consider any paper filed by the defendant with the clerk or with the court within the 10-day period to be written notice of appeal if it substantially complies with the requirements for content set forth in the Rule.[5] In *O'Neal* the defendant filed and appeal bond with the clerk on the day that judgment was entered against him, and the court found that "the recitals of that bond are entirely adequate to be accepted as a notice of appeal . . . ." 272 F.2d at 413 [Footnote omitted.] Likewise, letters sent to the clerk, *Belton* v. *United States,* 259 F.2d 811 (D.C. Cir. 1958), or to the court, *United States* v. *Cannady,* 34 F.R.D 211 (D.D.C. 1964), have been considered sufficient. See *Coppedge* v. *United States,* 369 U.S. 438, 422n.5 (1962), and cases cited therein. No case has been found which supports a finding that an *oral* notice of appeal is sufficient to satisfy Rule 37 (a) (1). In face, the Fifth

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[4]The subsequent amendment to Rule 37 (a) (2), which became effective on July 1, 1966, provides:

"If a timely motion in arrest of judgment or for a new trial on any groumd other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion."

The time for filing motion for new trial under Rule 33 has now been extended to 7 days, effective July 1, 1966.

[5]". . . . The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney . . . ." Fed. R. Crim. P. 37 (a) (1). These reqiurements have been simplified somewhat by recent amendment to the Rule, effective July 1, 1966.

Circuit, which decided the *O'Neal* case, rejected that contention in a case decided after *O'Neal Durel* v. *United States, supra.*

We do not decide that an oral notice of appeal transcribe into the record would never be sufficient to invoke jurisdiction in the court of appeals. Rather we hold that the case before us does not present a situation in which such notice can be considered adequate. The defendant is an attorney and was represented during the trial by retained counsel. He was free under bond during and after the trial. Furthermore, he had, with assistance of the same counsel who gave oral notice of appeal in the present case, perfect a prior appeal to this court in the same cause. It the Rule is to be applied at all, it should be applied in this case. We therefore dismiss the appeal because notice was not timely filed jn compliance with Rule 37 (a).

The defendant filed four other notices of appeal in this matter, which we shall consider seriatim. A judgment revoking defendant's probation on the ground that he refused to submit to supervision was entered by the district court on May 5, 1966, and defendant filed timely notice of appeal, docketed under No. 10,654, later supplemented by a second notice docketed under No. 10,656. In that judgment the district judge imposed a sentence of one year, 6 months active sentence with the remaining 6 months suspended, and 18 months probation to commence at the expiration of the active sentence upon condition that the defendant pay a 500-dollar fine. The record shows, and indeed the defendant admits, that the defendant informed the probation officer that he would not submit to supervision as re required by probation. Such action clearly constitutes grounds for revoking probation,

and the defendant has not alleged or shown any abuse of the trial judge's discretion in doing so. We therefore grant the Government's motion to dismiss defendant's appeal from the trial judge's revocation of probation as frivolous.

Second, the Government moves that No. 10,654 be remanded for proper sentencing, the Government conceding that the sentence imposed upon revocation of probation illegal. The defendant was originally prosecuted under 18 U.S.C. § 401 (1964), which provides for punishment by "fine or imprisonment" for the offense of criminal contempt of court. [Emphisis added.] Section 3651 of 18 U.S.C. provides:

> "Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment."

It follows, therefore, that the court may not impose a fine *and* place the defendant on probation if the offense is punishable by fine *or* imprisonment. *Cf. Mitchem* v. *United States,* 193 F.2d 55 (5 Cir. 1951); *United States* v. *Taylor,* 305 F.2d 183 (4 Cir. 1962). We think this limitation is applicable where the fine is made a condition of probation.[6] In remanding the case for resentencing, we call the district court's attention to the Supreme Court's mandate of June 6, 1966, that no sentence of more than six months may be imposed for criminal contempt in the absence of a jury trial. *Cheff* v. *Schnackenberg,* 384 U.S. 373.

We grant the Government's motion to dismiss as

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[6]We are aware of the decision of this court in Hollandsworth v. United States, 34 F.2d 423 (4 Cir. 1929). However, the holding of this case with regard to fine and probation has been superseded by the 1948 revision of the probation statutes. See Revisor's Notes, 18 U.S.C.A. § 3651 (1951).

untimely filed the defentant's appeal, No. 10,655, from the district court's denial of defendant's motion, filed April 24, 1966, to file a notice of appeal from the March 31, 1966, judgment. Notice of appeal was filed 14 days after denial of the motion.

Defendant filed timely notice of appeal, docketed under No. 10,963, from an order of the district court denying defendant a new trial. Since the motion was filed more than five days after the entry of judgment, the defendant may gain a new trial only by a showing of newly discovered evidence. *Fed. R. Crim. P 33; Mills* v. *United States* 281 F.2d 736 (4 Cir. 1960). The defendant did not allege newly discovered evidence as a ground for his motion below, nor has he stated any facts indicating that such evidence exists. Therefore, on motion of the Government, we dismiss the appeal as frivolous. *Spaulding* v. *United States,* 279 F.2d 65 (9 Cir.), *cert. denied,* 364 U.S. 887 (1960); *Pitts* v. *United States,* 263 F. 2d 808 (1959).

The appeals docteted under Nos. 10,653, 10,655

The appeals docketed under Nos. 10,653, 10,655, and 10,963 are dismissed. The appeal docketed under Nos. 10,654 and 10,656 is dismissed in part and the case is remanded for resentencing in accordance with this opinion.

Remanded.

APPENDIX

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 928

ELAM REAMUEL TEMPLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, was convicted of contempt for lying to a judge both orally and in a written statement filed with the court. The court of appeals, while upholding the power of the judge to punish this conduct as contempt, reversed and remanded for a new trial before another judge. 349 F. 2d 116. At the second trial, petitioner was again convicted. On March 31, 1966 he was sentenced as follows (1 R. 75):

> Imposition of prison sentence suspended—$500 fine. It is adjudged that defendant be placed on probation for a period of eighteen months under general conditions as recorded in the Clerk's office; and a special condition that fine be paid under supervision of the Probation Department.

At the time sentence was imposed petitioner's counsel gave notice of an intention to appeal. He asked, and the court agreed, that petitioner be continued on the then existing appearance bond.[1]

No written notice of appeal was filed within the ten-day period specified by Rule 37(a)(2). On April 12, petitioner was directed to submit to the terms of his probation. Without doing so, petitioner filed in the district court a document entitled "petition to appeal", dated April 15, 1966, in which he stated that his counsel had suffered a fall during the course of the trial. He alleged that although counsel had continued

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[1] The colloquy was as follows (2 R. 151-152):

> MR. HINSDALE: We object to the judgment of the Court and give notice of appeal to the Circuit Court of Appeals.
>
> THE COURT: All right, sir. Let his notice be . . .
>
> MR. HINSDALE: He is under at the present time $1,000.00 bond. I suppose that would be sufficient.
>
> THE COURT: Yes, sir, appearance bond $1,000.00 accepted.
>
> MR. HINSDALE: Would the present bond—
>
> THE COURT: Yes, sir.
>
> MR. HINSDALE: All right.
>
> THE COURT: He may be released under his present bond.

in the case, the failure to file a notice of appeal was due to the injury (1 R. 76). The district court, on April 25, 1966, ruled that it had no power to enlarge the time for taking an appeal (1 R. 83). Petitioner was thereafter notified to submit to the terms of his probation. On May 3, he was arrested and charged with violation of his probation. After a hearing, the court revoked probation on the ground that petitioner had failed to submit to supervision "after having given written consent to the terms of probation on April 27, 1966." On May 5, 1966, the court imposed a sentence of one year, six months to be served in jail, and six months on probation, with the special condition that petitioner pay the $500 fine under the supervision of the probation department (1 R. 89).

On May 10, 1966, petitioner filed three notices of appeal: (1) from the judgment of March 31, 1966, holding him in contempt (No. 10,653); (2) from the order of April 25, 1966, denying his petition for leave to appeal the original judgment (No. 10,655), and (3) from the sentence imposed on revocation of probation (No. 10,654) (3 R. 2, 88, 50). The government moved to dismiss the first two (3 R. 15-17, 101), but consented to the remand of the revocation proceeding (No. 10,654) for resentencing.[2] The court of appeals dismissed all appeals except that from the judgment of May 5, 1966, on revocation of

[2] Petitioner subsequently filed a notice of appeal from an order of May 30, 1966, denying as untimely a motion for a new trial, filed May 3, 1966, in which petitioner claimed that his attorney had been incapacitated from properly representing him (No. 10,693; 3 R. 162).

probation (No. 10,654). In that proceeding, it remanded for re-sentencing on the ground that the district judge was not permitted under 18 U.S.C. 3651, to impose a fine and to place a defendant on probation since the statute provides for fine *or* imprisonment. It also called the district court's attention to the holding in *Cheff* v. *Schnackenberg*, 384 U.S. 373, that no sentence of more than six months is permissible in the absence of a jury trial.

In this Court, petitioner challenges the ruling of the court below that he did not take a timely appeal from the original judgment of March 31, 1966. He relies upon the oral statement made by his counsel at the time of sentencing. With respect to this contention, the court of appeals said (Pet. 18):

> We do not decide that an oral notice of appeal transcribed into the record would never be sufficient to invoke jurisdiction in the court of appeals. Rather we hold that the case before us does not present a situation in which such notice can be considered adequate. The defendant is an attorney and was represented during the trial by retained counsel. He was free under bond during and after the trial. Furthermore, he had, with assistance of the same counsel who gave oral notice of appeal in the present case, perfected a prior appeal to this court in the same cause. If the Rule is to be applied at all, it should be applied in this case.

This ruling was amply justified in the circumstances of this case. No court has yet held that an oral statement in open court is, in and of itself, a sufficient notice of appeal. The decisions in which the issue

has been presented have been to the contrary. See *Durel* v. *United States*, 299 F. 2d 583 (C.A. 5); *United States* v. *Isabella*, 251 F. 2d 223 (C.A. 2); *Peoples* v. *United States*, 324 F. 2d 689 (C.A. 10). In *Peoples*, this Court (378 U.S. 586) remanded the case to the court of appeals for reconsideration in the light of *Fallen* v. *United States*, 378 U.S. 139. The court of appeals thereafter adhered to its prior decision, 337 F. 2d 91, and this Court denied certiorari, 381 U.S. 916.

On the facts of this case, the oral notice was plainly inadequate. Not only was petitioner represented by counsel, but he was himself an attorney. It is apparent from the history of the case that petitioner took no action until he was actually required to submit to probation. After first being asked to do so on April 12, 1966, he filed his petition for leave to appeal out of time. Although that was denied on April 25, 1966, petitioner did not attempt to perfect his alleged appeal from the original judgment, or even to seek relief in the court of appeals. Nor did he file a timely notice of appeal from that order. Only after petitioner's probation was actually revoked on May 5 did he, on May 10, 1966, finally file a written notice of appeal.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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